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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-1707

INTERNATIONAL WIRE

Petitioner,

vs.

LOCAL 38, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

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93 Cong. Rec. 4858 (1947). 8

IN THE SUPREME COURT OF THE UNITED STATES

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No._____

INTERNATIONAL WIRE

Petitioner,

v.

LOCAL 38, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

International Wire petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at ____ F.2d ____ No. 72-168, 82

LRRM 3064. A copy of the Court of Appeals Decision is attached hereto as "Appendix A." The Memorandum and Memorandum and Order of the District Court are unreported, and are attached hereto as "Appendix B" and "Appendix C," respectively.

JURISDICTION

The judgment of the Sixth Circuit was entered March 20, 1973 ("Appendix D"). Jurisdiction of this Court is invoked under 28 U.S.C. §1254(i).

QUESTION PRESENTED

Whether refusal by the National Labor Relations Board, in an unfair labor practice proceeding, to find a violation of Section 8(b)(4) of the National Labor Relations Act warrants dismissal of an action brought in District Court under Section 303 of said Act.

STATUTES INVOLVED

The relevant provisions of the National

Labor Relations Act, as amended (29 U.S.C. 151, et seq.) are as follows:

"Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents--

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;"

* * *

Sec. 303. (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefore in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

STATEMENT

In May, 1970, International Wire (hereinafter referred to as "Petitioner") filed a complaint in the District Court for the Northern District of Ohio, Eastern Division. The complaint charged International Brotherhood of Electrical Workers, Local 38, (hereinafter referred to as "Respondent") with a violation of the secondary boycott provisions of the National Labor Relations Act.

Jurisdiction for Petitioner's lawsuit was conferred by Section 303 of National Labor Relations Act, 29 U.S.C. §187. At the same time Petitioner filed a charge with the National Labor Relations Board.

Petitioner was the holder of an exclusive license to sell a product called Mineral Insulated (MI) Cable. A subcontractor on a large apartment development in a Cleveland suburb had agreed to purchase MI Cable for use on that project. Respondent's members, in April, 1970, struck the contractor. The result of this work stoppage was in fact to force the contractor to cease dealing with Petitioner. As a result of these activities Petitioner was unable to distribute MI Cable and it lost its business, being compelled to shut down.

A hearing was held before an NLRB Trial Examiner. On March 9, 1971, a decision was issued by the Trial Examiner finding for Respondent. This decision was subsequently

adopted by the National Labor Relations Board (191 NLRB No. 109, 77 LRRM 1715). In February, 1972, counsel for Respondent filed a Motion for Summary Judgment in the still pending District Court damage action. As the basis for this Motion, the Respondent urged that the administrative determination was res judicata as to all issues in the lawsuit. On April 12, 1972 the District Court by memorandum opinion ("Appendix B") denied this motion. On May 1, 1972, a renewed Motion for Summary Judgment was filed. On June 6, 1972, in a two-page Memorandum and Order ("Appendix C") this renewed Motion was granted by the Court.

Petitioner appealed to the Sixth Circuit. In a per curiam opinion, that Court ruled:

> "We believe the doctrine of collateral estoppel applies to bar this §303 action under the reasoning set forth in the Memorandum Opinions of the District Judge and under the authority cited by him therein."

REASONS FOR GRANTING THE WRIT

A. The Decision Of The Sixth Circuit Contravenes The Language Of The Statute, The Intent Of Congress, And The Interpretations Of The Statute By This Court.

The general principle of law followed by the District Court herein, and approved by the Court of Appeals, is that decisions of administrative agencies may, under certain circumstances, preclude litigation of the same factual issue in a court of law. This principle was enunciated in U.S. v. Utah Mining and Construction Co., 384 U.S. 394 (1966). Petitioner is not contesting the validity of the foregoing general principle. We strongly contend, however, that it is not applicable to lawsuits brought by an alleged victim of a secondary boycott under §303, supra.

We submit that Congress, in drafting §303, intended that any activity "defined as an unfair labor practice in section 8(b)(4)" be subject to a system of adjudication wholly apart from the administrative procedures utilized by the Board.

The purpose of §303 was to provide an independent remedy to victims of secondary boycotts and the other conduct proscribed in §8(b)(4). In proposing this section on the floor of the Senate, Senator Taft, the bill's sponsor, stated:

> ". . .[§303] provides for direct suits in cases of secondary boycott. I think that will be a powerful deterrent." 93 Cong. Rec. 4843 (1947)

On the day Congress voted to add §303 to the amended Act, Senator Taft elaborated on the mechanics of this added deterrent:

> "We considered making it [the right of injured persons to receive money damages] a procedure through the National Labor Relations Board but it is not felt . . . that the Labor Board is an effective tribunal for the purpose of trying to assess damages in such a case." 93 Cong. Rec. 4858 (1947)

From these statements the clear intent of the framers of §303 emerges. Secondary boycotts were seen as sufficiently destructive of the free enterprise system to be punishable through two separate rights of action. Having recognized the inherent limitation of Board

proceedings and remedies, the proponents of §303 made a conscious decision not to allow the Board to pre-empt redress of union-inflicted injuries in this area. Congress explicitly, through the new Sections 8(b)(4) and 303, created a system of double deterrents encompassing the area of secondary boycotts.

The independent character of §303 was stressed by this Court in International Longshoremen's and Warehousemen's Union v. Juneau Spruce Corp., 342 U.S. 237 (1952). Discussing the duality of the two statutory deterrents, the Court concluded:

> "The fact that the two sections [8(b)(4)(D) and 303] have an identity of language and yet specify two different remedies is strong confirmation of our conclusion that the remedies provided were to be independent of each other." (Emphasis Added)

And in Local 20, Teamsters, Chauffeurs & Helpers Union, etc. v. Morton, etc., 377 U.S. 252, 258, (1964), the Court held:

"Section 303(b) of the Labor-Management Relations Act expressly authorizes state and federal courts to award damages to any person injured by certain secondary boycott activities described in §303(a). The type of conduct to be made the subject of a private damage action was considered by Congress, and §303(a) comprehensively and with great particularity 'describes and condemns specific union conduct directed to specific objectives.'" Carpenters Local 1976 v. Labor Board. . ."

In 1969 the Fifth Circuit ruled, for the first time, that a determination by the Board under Section 8(b)(4) was res judicata in a subsequent §303 lawsuit. Painters District Council 38, etc. v. Edgewood Contracting Company, 416 F.2d 1081 (5th Cir., 1969). In the instant case, the Courts below relied not on res judicata but on the doctrine of collateral estoppel. They ruled, in effect, that the Board's role as trier of fact could be equated to that of a District Court. Both the Fifth Circuit in Edgewood and the Sixth Circuit in the instant case, relied on U.S. v. Utah Mining & Construction Co., supra.

As has already been noted, Petitioner has no quarrel with the general principle enunciated in Utah Mining, that decisions of administrative agencies may, under certain circumstances, preclude courts of law from adjudicating the same facts. Petitioner has demonstrated, however, that §303 constitutes a well-established exception to this general doctrine of law.

The Sixth Circuit has chided Petitioner because "no petition to review [the NLRB Decision] had been filed by appellant in this court." Since Petitioner's business had been destroyed and since a successful appeal of the Board's Decision would have produced merely a cease and desist order, an appeal would have been futile. Petitioner's only hope of redress is through its §303 lawsuit. This Court, in recognizing the duality of procedures and remedies established under the Act, has never precluded a party from pursuing alternative courses of action. For example, in construing the right to bring suit under

§301 of the Act, the Court ruled, in Smith v. Evening News Association, 371 U.S. 195 197, (1962):

> "The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by §301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under §301. If, as respondent strongly urges, there are situations in which serious problems will arise from both the courts and the Board having jurisdiction over acts which amount to an unfair labor practice, we shall face those cases when they arise." (Emphasis Added)

Petitioner submits that this is such a case.

B. A Conflict of Various Courts of Appeal Exists With Respect To The Issue Presented Herein.

Prior to the instant case, the Sixth Circuit had refused to give any effect to NLRB determinations in Section 303 suits. In United Brick and Clay Workers v. Deena Artware, 197 F.2d 645 (6th Cir., 1952), cert. denied, 345 U.S. 906 (1953). The Court of Appeals was faced with conflicting decisions by the Board and a lower court.

Enforcing the lower court's award of damages under §303, the Sixth Circuit held:

> "We recognize that this finding is contrary to the finding in the companion case of NLRB v. Deena Artware. . . Under our existing system of courts, juries, administrative agencies, and appellate review, such findings, even though inconsistent are not invalid and one does not destroy the other." 198 F.2d at 642.

See also Riverton Coal v. UMW, supra.

The Second Circuit refuses to give res judicata effect to the Board's §8(b)(4) decisions. In Old Dutch Farms, Inc. v. Milk Drivers and Dairy Employees Local Union No. 584, etc., 359 F.2d 598 (2nd Cir., 1966) the Court stated, at footnote 7, page 602:

> "Prior to the commencement of this action, the NLRB determined that the union had violated §8(b)(4) of the NLRA. It should be noted, however, that a prior determination by the Board is not a prerequisite to an action by an employer under §303. The administrative and judicial actions and remedies are viewed as entirely independent, i.e., §303 suits constitute a clear exception to the exclusive jurisdiction of the NLRB over alleged unfair labor practices. [citations omitted] Moreover, an administrative determination, such as the one involved

here, does not bind a court confronted with the question of whether a particular union activity violated §8(b)(4) in a §303 suit."

Following Old Dutch Farms, supra, the District Court for the Southern District of New York, has twice rejected the contention that res judicata should be applied in §303 suits. Strip Clean Floor Corp. v. District Council, 333 F.Supp. 385 (S.D.N.Y., 1971); Peterson, et al. v. Associated Musicians of Greater New York, Local 802, 80 LRRM 2182.

On the other hand, as has been noted above, the Fifth Circuit has applied the doctrine of res judicata since Painters District Council 38 v. Edgewood Contracting Company, supra. See H. L. Robertson and Associates v. Plumbers Local 519, 429 F.2d 520, (5th Cir., 1970); Texaco, Inc. v. Operative Plasterers, etc., No. 72-2890 ___ F.2d ____, 82 LRRM 2384 (5th Cir., 1973) The Ninth Circuit has adopted the Edgewood rule. See Paramount Systems v. Teamsters Local 150, 436 F.2d 1064 (9th Cir., 1971).

Significantly, in all of the cases in which res judicata effect has been given to the Board's §8(b)(4) determinations - prior to the case at bar - the Board had found violations of the Act. Accordingly, the application of res judicata therein was consistent with Congressional policy of providing redress to victims of secondary boycotts.

C. In View Of The Importance Of The Issue Presented Herein To National Labor Policy, As Well As The Conflict Of Circuits, Certiorari Should Be Granted To Provide Guidance And Uniformity In The Administration Of The Act.

At the present time much uncertainty exists concerning the effect of Labor Board determinations under §8(b)(4). When preparing to try a case under §8(b)(4), practitioners are uncertain as to whether they are actually trying the §303 suit at the same time. This state of confusion exists because of the conflict of Circuits discussed above. Although there may be some certainty in the Second Circuit, the Fifth Circuit and the Ninth Circuit, there is great uncertainty

in the Sixth Circuit - which appears to have gone both ways on this issue - and in the Circuits which have not yet been faced with the problem. Petitioner suggests that the time is now ripe for this Court to resolve the problem and restore uniformity to the administration of the Act. Action is especially warranted by the need to reaffirm the intention of Congress to provide independent avenues of redress to secondary boycott victims.

CONCLUSION

This Petition For Certiorari should be granted.

Respectfully submitted,

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No. 72-1688

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

INTERNATIONAL WIRE,
Plaintiff-Appellant,

v.

LOCAL 38, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Defendant-Appellee.

APPEAL from the United States District Court for the Northern District of Ohio, Eastern Division.

Decided and Filed March 20, 1973.

Before: WEICK, EDWARDS and CELEBREZZE, Circuit Judges.

PER CURIAM. Appellant International Wire appeals from the dismissal of its § 303 complaint on appellee's motion for summary judgment. Labor-Management Relations Act, 29 U.S.C. § 187 (1970). Appellant had charged Local 38, International Brotherhood of Electrical Workers with a secondary boycott. Appellant simultaneously filed proceedings in the form of an unfair labor practice before the National Labor Relations Board and the instant § 303 action in the United States District Court for the Northern District of Ohio.

A full hearing was held before an NLRB Trial Examiner. The Trial Examiner and the Board found that no unfair labor practice, as charged in the complaint, had been proved and dismissed the complaint.

Thereafter appellee filed a motion for summary judgment in the District Court action, asserting that under the determination by the Board, appellant's § 303 complaint was either

barred by the doctrine of res judicata or appellant was collaterally estopped from denying the findings and conclusions of the NLRB.

In two well-reasoned memorandum opinions which dealt appropriately with the authorities relied upon by appellant, the District Judge found that the issues before the Labor Board and the issues in the instant action were identical. He found the Labor Board decision had become final and no petition to review same had been filed by appellant in this court, as provided by law. He also found that there was no contention in this case that plaintiff had been denied a full and fair hearing at the administrative level. He thereupon granted the motion for summary judgment dismissing plaintiff's complaint.

We believe the doctrine of collateral estoppel applies to bar this § 303 action under the reasoning set forth in the Memorandum Opinions of the District Judge and under the authority cited by him therein. *United States* v. *Utah Construction and Mining Co.*, 384 U.S. 394 (1966); *Tipler* v. *duPont Co.*, 443 F.2d 125 (6th Cir. 1971).

The judgment of the District Court is affirmed.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

APR 12 8 32 AM '72
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO

INTERNATIONAL WIRE Plaintiff v. LOCAL 38, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, et al Defendants	)	Case No. C70-368 MEMORANDUM

GREEN, J.:

This is an action under the Labor Management Relations Act, with jurisdiction alleged pursuant to Section 303 thereof, 29 U.S.C. §187. The complaint alleges that, prior to April 8, 1970, plaintiff sold a substantial quantity of an electrical product known as mineral insulated cable to the Electrolite Corporation, Inc. It is further alleged that:

> 7) Since on or about February 15, 1970, defendant Union acting through its agents and officers Gilbert Steele, Richard Acton, Mason Edwards, and Ralph Bauman has threatened, coerced and restrained the Electrolite Corporation, Inc. demanding that said The Electrolite Corporation, Inc. cease using, handling or installing said cable and accessories.

"APPENDIX B"

8) Since on or about April 9, 1970, the defendants have required, compelled, induced and encouraged employees of the Electrolite Corporation, Inc. to refuse during the course of their employment to handle, use, process or install said cable and accessories.

9) The object of the conduct of the defendants as set forth in paragraphs 7 and 8 above was, and continues to be, to illegally force and/or require said The Electrolite Corporation, Inc. and said employees and other persons to cease using, selling, handling and supporting, or otherwise dealing in the products of International Wire, the plaintiff herein.

Defendants have moved for summary judgment. Such motion is predicated upon the contention that the same facts which give rise to this action were presented to the National Labor Relations Board on a complaint of an illegal secondary boycott filed by International Wire, and that the Board found the Union was not guilty of a violation of Section 8(b)(4)(i)(ii)(B) of the Labor Management Relations Act, 29 U.S.C. §158(b)(4)(i)(ii)(B). It is defendants' theory that such determination "is res judicata of all the issues in the Section 303 case under the same Labor Management Relations Act."

The broad question of the res judicata effect of administrative decisions in general, and rulings of the National Labor Relations Board in particular, is not en-

tirely settled. See, Davis, Administrative Law, §§18.01-18.12, inclusive. In considering the same, however, it is clear that the line of authority represented by Thomas v. Consolidation Coal Co., 380 F. 2d 69 (CA 4, 1967), Aircraft and Engineering Maintenance, etc., Local 290 v. I. E. Schilling Co., 340 F. 2d 286 (CA 5, 1965) and Taube Electrical Contractors, Inc. v. IBEW, 261 F. Supp. 664 (S.D. Fla., 1966), is irrelevant to the issue. In each of those cases the NLRB declined to take action on the complaint of an unfair labor practice. Hence, there was no final administrative decision which could support a claim of res judicata. Davis, Administrative Law, §18.06.

In support of their position defendants rely upon the decisions of the Fifth Circuit Court of Appeals in Painters District Council No. 38, etc., v. Edgewood Contracting Co., 416 F. 2d 1081 (1969) and H. L. Robertson & Associates, Inc. v. Plumbers Local Union No. 519, etc., 429 F. 2d 520 (1970). In those actions the court, relying on the Supreme Court decision in United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966), held that an NLRB decision was res judicata in a damage action predicated upon the same state of facts.

In Painters District Council No. 38 the court adopted the District Court's findings that:

> . . . the Board had conducted a full hearing, with the present parties represented by counsel (the same counsel as in the instant action), with full opportunity to present evidence, and to call, examine and cross-examine witnesses. Both parties made oral arguments. There is only the pale shadow of an argument to us that there is any issue concerning liability that was undecided before the Board. 416 F. 2d 1081, 1084.

On the basis that "[t]he union makes no claim that it was denied a full and fair hearing before the trial examiner or that his decision, or the action by the Board, was arbitrary or capricious or that the Board's determination was unsupported on the record as a whole", 416 F. 2d 1081, 1083, the court held the defendant was foreclosed from relitigating the NLRB's determination that it had engaged in a secondary boycott.

Similarly, in the Robertson decision, the court applied the rule of res judicata upon a finding that:

> . . . the record in this case shows that the Board conducted a full hearing on the issue of the legality vel non of Local 519's activities at the jobsite, with the present parties represented at that hearing by counsel. It does not appear that there are any issues regarding the union's liability which were not decided by the Board or that there is evidence that the Board did not consider. 429 F. 2d 520, 521.

The same rule of res judicata has been applied by the Ninth Circuit Court of Appeals in Paramount Transport Systems v. Chauffeurs, etc., Local 150, 436 F. 2d 1064 (1971). The court, as did the Fifth Circuit, found support for its position in the Supreme Court ruling in United States v. Utah Construction & Mining Co., supra.

The validity of the rationale of the rule of res judicata was specifically recognized in Purvis v. Great Falls Building and Construction Trades Council, 266 F. Supp. 661 (Mont., 1967), wherein the court stated that:

> A tower of words can be constructed which would support the conclusion that a cease and desist order of the National Labor Relations Board enforced by a court of appeals is res judicata and in some cases it may very well be. An order of the National Labor Relations Board based on a full hearing and merged in a court decree is required to be treated as a decree of the court.

On the facts of the action, however, the court found that res judicata should not apply, in that the cease and desist order issued upon a stipulation which did not contain any admission of violation of the federal labor laws.

Of a similar import is the holding in Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, (CA 9, 1965). In that ruling the court foreshadowed its acceptance of the theory of res judicata, as enunciated in th Paramount Transport Systems decision some

six years later. While stating, in dictum, that the rule of res judicata might be applicable in relation to some administrative decisions, the court found that there was not a substantial identity of issues as between the civil litigation and the prior unfair labor practice charges adjudicated by the NLRB.

As those courts which have applied the rule of res judicata to decisions of the NLRB have done so in partial reliance on the Supreme Court decision in United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966), it is well to examine that holding.

In that action the company, a contractor for the construction of a facility for the Atomic Energy Commission, brought suit under the Tucker Act, 28 U.S.C. §1346(a)(2), based upon alleged multiple breaches of its contract. Prior thereto, in accordance with the controlling terms of the contract (referred to as the "disputes" clause), the contractor's claims had been submitted to administrative processing. In that proceeding hearings were held and determinations of fact made. The administrative body, in the main, denied the contractor's claims. However, while denying a claim for additional compensation the board found one delay involved to be the result of difficulties inherent in a new field of construction rather than the fault of

either party, and granted the contractor an extension of time for a portion of the contract.

Pursuant to the Wunderlich Act of 1954, 41 U.S.C. §321, determination of disputes required to be submitted to administrative appeal "shall be final and binding unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence." In the Court of Claims it was held that certain of the contractor's claims were foreclosed from de novo consideration by the provisions of the Wunderlich Act. However, it was further held that certain other of the claims seeking damages arising from delays alleged to have been occasioned by government action were not "disputes" within the context of the contract clause requiring "disputes concerning questions of fact arising under this contract" to be submitted to the administrative procedures. As to those aspects of the contractor's action the Court of Claims held that it could exercise de novo jurisdiction.

In the Supreme Court it was urged on behalf of the government that the "disputes" clause was all-inclusive of any dispute relating to the contract. The court rejected that position on the basis that the administrative board "lacked authority to consider delay damages". However,

the court further found that the board "did have authority to consider the requests for extensions of time under Articles 4 and 9, and these requests called for an administrative determination of the facts". 384 U.S. 394, 418. Based upon the finding that the administrative board did have authority to consider the facts regarding the alleged delays, the Supreme Court held that:

> Such findings, if they otherwise satisfy the standards of the Wunderlich Act, are conclusive on the parties, not only with respect to the Articles 4 and 9 claims but also in the court suit for breach of contract and delay damages. 384 U.S. 418-419.

While the court's decision was controlled by the statutes under consideration, the Supreme Court made the point that the same result would have been reached in the absence thereof. It was stated that:

> Although the decision here rests upon the agreement of the parties as modified by the Wunderlich Act, we note that the result we reach is harmonious with general principles of collateral estoppel. Occasionally courts have used language to the effect that res judicata principles do not apply to administrative proceedings, but such language is certainly too broad. When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose. [citations omitted]

> In the present case the Board was acting in a judicial capacity when it considered the Pier Drilling and Shield Window claims, the factual disputes resolved were clearly relevant to the issues properly before it, and both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings. There is, therefore, neither need nor justification for a second evidentiary hearing on these matters already resolved as between these two parties. 384 U.S. 394, 421-422.

It would thus appear that the Supreme Court has ruled that the principles of collateral estoppel and res judicata may, in proper circumstances, be applied to administrative decisions as related to subsequent court actions. The Sixth Circuit has recognized the general applicability of that rule in an action involving an NLRB decision, holding, however, that under the facts of the action the imposition thereof was not warranted. Tipler v. E. I. duPont deNemours and Co., 443 F. 2d 125 (1971).

In the Tipler case the plaintiff brought suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., alleging a racially discriminatory discharge from his employment. Prior thereto:

> . . . appellee filed a charge with the National Labor Relations Board (NLRB), alleging in general terms that he had been fired in violation of Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act. In an amended charge he specified that appellant

> had discharged him because of his union activities. Following an extended evidentiary hearing, the NLRB Trial Examiner found that appellee was dismissed for cause and not because of the personal vengeance of appellant's foreman, and recommended that appellee's claim be dismissed. The NLRB accepted the Trial Examiner's findings and recommendations. 443 F. 2d 125, 127.

In the Court of Appeals it was urged that the plaintiff "is precluded by res judicata and collateral estoppel from asserting that he was discharged because of racial prejudice since the cause of his discharge was previously litigated by the NLRB".

The court first noted the distinction between the "frequently confused" rules of collateral estoppel and res judicata, observing that "application of the doctrine of res judicata necessitates an identity of causes of action, while the invocation of collateral estoppel does not", and that under collateral estoppel the parties are bound "only as to those matters or points which were in issue or controverted and upon the determination of which the initial judgment necessarily depended". 443 F. 2d 125, 128. The court then stated that:

> Neither collateral estoppel nor res judicata is rigidly applied. Both rules are qualified or rejected when their application would contravene an overriding public policy or result in manifest injustice. Title v. Immigration and Naturalization Service, 322 F. 2d 21 (9th Cir. 1953); Matias Rivera v. Gardner, 286 F. Supp. 305 (D.P.R. 1968); Old Dutch Farms, Inc. v. Milk Drivers & Dairy Employees

> Local Union No. 584, 281 F. Supp. 971 (E.D. N.Y. 1968); 1B Moore's Federal Practice ¶0.405[12], at 791; 2 K. Davis, Administrative Law Treatise §18.02, at 548 (1958).
>
> It is now accepted that both res judicata and collateral estoppel can be applicable to decisions of administrative agencies acting in a judicial capacity. United States v. Utah Construction & Mining Co., 384 U.S. 394, 86 S. Ct. 1545, 16 L. Ed. 2d 642 (1966); Painters District Council No. 38 v. Edgewood Contracting Co., 416 F. 2d 1081 (5th Cir. 1969); Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 131 U.S. App. D.C. 226, 404 F. 2d 804 (D.C. Cir. 1968), cert. denied, 393 U.S. 1093, 89 S. Ct. 872, 21 L. Ed. 2d 784 (1969); Fairmont Aluminum Co. v. Commissioner of Internal Revenue, 222 F. 2d 622 (4th Cir.), cert. denied, 350 U.S. 838, 76 S. Ct. 76, 100 L. Ed. 748 (1955); 2 K. Davis, Administrative Law Treatise §18.02, at 609 (Supp. 1970). Cf. Safir v. Gibson, 432 F. 2d 137 (2d Cir.), cert. denied, see 400 U.S. 850, 91 S. Ct. 57, 27 L. Ed. 2d 88 (1970). 443 F. 2d 125, 128.

Having accepted the rule of law reflected by the foregoing quotation, the court held that "in the instant action it would be inappropriate to apply either" the doctrine of res judicata or collateral estoppel. That conclusion was predicated upon the finding that "the NLRB hearing did not adequately consider the facts necessary for

a Title VII violation". The NLRB hearing was concerned with "the question whether the appellee's union activities led to his discharge", and "did not fully explore the racial aspects of the case", which underlay the Title VII action. 443 F. 2d 125, 129.

The Tipler decision seriously undercuts plaintiff's contention that the Sixth Circuit Court of Appeals has rejected the application of res judicata and/or collateral estoppel to decisions of the NLRB. In support of that position plaintiff relys on the following language found in the decision in Riverton Coal Co. v. United Mine Workers, _____ F. 2d _____ (CA 6, Nos. 71-1021 and 71-1022, 1/21/72):

> We do not regard the decisions of the [National Labor Relations] Board as controlling on us in damage actions under Section 303. International Longshoremen's and Warehousemen's Union v. Juneau Spruce Corp., 342 U.S. 237 (1952); United Brick & Clay Workers v. Deena Artware, Inc., 198 F. 2d 637 (6th Cir. 1952), cert. denied, 344 U.S. 897 (1952), rehearing denied, 344 U.S. 919 (1953); NLRB v. Deena Artware, 198 F. 2d 645 (6th Cir. 1952), cert. denied, 345 U.S. 906 (1953); Old Dutch Farms, Inc. v. Milk Drivers, 281 F. Supp. 971 (E.D. N.Y. 1968).

In the Court's opinion, the foregoing may easily be reconciled with the holding in the Tipler case. In Tipler, the rule which was adopted was a flexible one,

proceeding from the premise that "neither collateral estoppel nor res judicata is rigidly applied". That is essentially the same concept reflected by the ruling of the Fifth Circuit in the Painters District Council No. 38 case, cited with approval by the Sixth Circuit in Tipler, that a party's right to relitigate issues previously determined in an administrative proceeding must be determined upon analysis of the factors relating to the nature and extent of the administrative proceeding.

This Court believes that the import of the Riverton Coal decision represents a repudiation of a per se concept of finality being accorded administrative rulings in every instance, and is not a rejection of the individual applicability of collateral estoppel or res judicata to a particular case. That conclusion is reinforced by the Sixth Circuit citation of Old Dutch Farms, Inc. v. Milk Drivers, 281 F. Supp. 971 (E.D. N.Y., 1968) in both Tipler and Riverton Coal. In the Old Dutch Farms decision the court's ruling was controlled by the following view of the law:

> Although there is language in some of the cases to the effect that the principles of res judicata and collateral estoppel are inapplicable to administrative proceedings, such language is certainly too broad. The policy considerations favoring finality to litigation, the prevention of needless

duplication, and the avoidance of additional burdens in time and expense are as relevant to the administrative as to the judicial process. See, United States v. Utah Const. & Mining Co., 384 U.S. 394, 420, 86 S. Ct. 1545, 1559, 16 L. Ed. 2d 642 (1966); International Union of Mine, Mill and Smelter Workers, Local No. 15 v. Eagle-Picher Mining & Smelting Co., 325 U.S. 335, 340, 65 S. Ct. 1166, 1168, 89 L. Ed. 1649 (1945). Furthermore, complete disclosure at the administrative level should be encouraged. United States v. Utah Const. & Mining Co., supra. Thus, "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." United States v. Utah Const. & Mining Co., supra, 384 U.S. at 422, 86 S. Ct. at 1560.

Where there is some good reason for a new judicial inquiry into the same facts, however, the courts will not view the administrative findings as final. See, United States v. Utah Const. & Mining Co., supra at 421 n. 18, 86 S. Ct. at 1559 n. 18. Indeed, they appear in accord with Professor Davis's view that the doctrine of res judicata should be used when the reasons for it are present in full force, modified when such modification is needed, and rejected when the reasons against its use outweigh those in its favor. 2 Davis, Administrative Law §18.02 at 548 (1958). The crucial issue upon this motion, therefore, is whether there is some factor present either in the prior proceedings or the nature of an action under §303 which militates against the application of the doctrine.

In Riverton Coal the court found that there were factors present in the administrative proceedings which negated the conclusive effect of the administrative decision.

Having determined that collateral estoppel may be invoked against the plaintiff herein, it does not necessarily follow that defendants are entitled to an entry of summary judgment at this juncture.

From the Court's review of the controlling law, it is clear that whether collateral estoppel should be applied in any given case depends upon many factors, basically revolving around the nature of the administrative decision and the adequacy of the fact finding procedures utilized therein.

Rule 56(e) of the Federal Rules of Civil Procedure dictates that a summary judgment may be entered only on the basis of an affirmative showing by way of affidavits, exhibits, or otherwise, that there is no genuine issue for trial.

In defendants' brief it is asserted that the same issues as are involved in this lawsuit were before the NLRB. It is further asserted that the same counsel as represent the parties herein participated in a three-day hearing before a Trial Examiner, producing a 565-page transcript. It is further asserted that voluminous briefs were filed before the Examiner, who ruled, on March 9, 1971,

in favor of the union. It is then stated that, following exceptions to the Examiner's recommendations by the company, the Labor Board, on June 25, 1971, issued its decision dismissing the complaint.

However, the only exhibit submitted on behalf of defendants is a summary of the Board's decision as contained in a labor-reporting service.

On the basis of that meager record, not supportive of the representations made by way of brief, the Court does not believe that a summary judgment can be granted. While it may not be necessary to introduce into this record every word spoken and written in the NLRB proceedings in order to satisfy the burden of demonstrating that plaintiff should be estopped from proceeding in this action, defendants certainly must make a more substantial showing, in conformity with Rule 56, F.R.C.P., than has been done.

Defendants' motion for summary judgment will be denied, without prejudice to a renewal thereof properly supported in accordance with Rule 56, F.R.C.P.

Ben C Green

United States District Judge

April // , 1972

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

INTERNATIONAL WIRE Plaintiff v. LOCAL 38, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, et al Defendants	)	Case No. C70-368 MEMORANDUM and ORDER

GREEN, J.:

On April 11, 1972 this Court entered a memorandum opinion denying, without prejudice, defendants' motion for summary judgment. The question raised by that motion was whether plaintiff's claim was barred by res judicata. The Court held that while the doctrine of res judicata applied to the instant case defendants had not made a sufficient showing of identity between the issues determined between these same parties in proceedings before the NLRB and the issues raised herein.

Defendants have now renewed their motion for summary judgment. The renewed motion is supported by copies of substantial portions of the proceedings before the Labor Board, including the decisions of the Trial Examiner and the NLRB.

I Hereby Certify that the annexed instrument is a true and correct copy of the original on file in my office.
Attest: Dennis J. Colvin, Clerk
U. S. District Court
Northern District of Ohio
By _____ Deputy Clerk

"APPENDIX C"

In opposition to the renewed motion, plaintiff continues to contend that res judicata does not apply herein. That issue has already been determined. Plaintiff also argues that the administrative decision is not supported by substantial evidence.

Having considered defendants' submission, the Court finds that the issues before the Labor Board and the issues of this action are the same, a fact which is tacitly admitted by plaintiff. The Court further is of the opinion that the administrative decision has not been shown by defendant to be unsupported by substantial evidence. There is no contention that plaintiff was denied a full and fair hearing on the administrative level.

It therefore follows that the ruling of the NLRB is res judicata as to the issues of this action, and that defendants are entitled to the entry of summary judgment in their favor dismissing plaintiff's complaint.

IT IS SO ORDERED.

United States District Judge

June 5, 1972

72-1688

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
CINCINNATI, OHIO 45202

March 20, 1973

Messrs. Louis S. Belkin and
Jeffrey A. Belkin
230 Leader Building
Cleveland, Ohio 44114

Mr. Thurlow Smoot
2141 Illuminating Bldg.,
Cleveland, Ohio 44113

Re: International Wire Co.
v.
Local 38, International Brotherhood of
Electrical Workers, et al.
Case No. 72-1688

Gentlemen:

Enclosed is a copy of the Court's opinion which was announced today in the above-entitled case.

A judgment in conformity with the opinion has been entered today as required by Rule 36.

Yours very truly,

James A. Higgins, Clerk

Chief Deputy

Enclosure

"APPENDIX D"

CERTIFICATE OF SERVICE

Three copies of the foregoing Petition were served by U.S. Mail, postage prepaid, upon Thurlow Smoot, Esq., 2141 Illuminating Building, Cleveland, Ohio, 44113, on this 15th day of June, 1973.

Louis J. Belkin

L. J. Belkin